



File Code: 1570-1

Date: March 18, 2008

Frank Jeff Verito
350-1/2 East Ridge Street
Marquette, MI 49855

RE: Appeal of the Decision Memo for the Permanent Opening (Westside) Project, Rapid River/Manistique/Munising Ranger Districts, Hiawatha National Forest, Appeal 08-09-10-0027 A215

Dear Mr. Verito:

On March 1, 2008, you filed a notice of appeal pursuant to 36 CFR 215.11. District Ranger David Silvieus signed the Decision Memo on December 20, 2007, and the legal notice was published in *The Daily Press*, Escanaba, Michigan on December 27, 2007. I have reviewed the Appeal Record and have also considered the recommendation of the Appeal Reviewing Officer (ARO), District Ranger Nancy Larson of the Superior National Forest, regarding the disposition of your appeal. The ARO's review focused on the decision documentation developed by the Responsible Official, District Ranger David Silvieus, and the issues in your appeal. The ARO's recommendation is enclosed. This letter constitutes my decision on the appeal and on the specific relief requested.

FOREST ACTION BEING APPEALED

This project maintains 16 existing permanent openings (approximately 5,100 acres) through the use of prescribed burning and/or mechanical/hand clearing techniques.

APPEAL REVIEWING OFFICER'S RECOMMENDATION

The ARO found no evidence that the Responsible Official's decision violated law, regulation, or policy. She found the decision responded to comments raised during the analysis process and public comment period and adequately assessed the environmental effects of the selected action. In addition, she found the issues in your appeal (i.e., Purpose and need, Non-Native Invasive Species, and the Forest Plan) were addressed, where appropriate, in the decision documentation. Based on this review, the ARO recommended that District Ranger David Silvieus' Permanent Openings (Westside) Decision Memo be affirmed.



DECISION

After careful review of the Project Record and the appeal, I concur with the ARO's analysis and findings regarding your appeal issues. To avoid repetition, I adopt the ARO's rationale as my own, and refer you to her enclosed recommendation letter, dated March 14, 2008, for further details. It is my decision to affirm District Ranger David Silvieus' Decision Memo for the Permanent Opening (Westside) Project on the Hiawatha National Forest.

Pursuant to 36 CFR 215.18(c) this decision constitutes the final administrative determination of the Department of Agriculture. This decision may be implemented on, but not before, the 15th business day following the date of this letter (36 CFR 215.9(b)).

Sincerely,

/s/ Thomas A. Schmidt
THOMAS A. SCHMIDT
Forest Supervisor
Appeal Deciding Officer

Enclosure

cc: Patricia R Rowell, David J Silvieus, Anne Davy



Forest
Service

Superior
National
Forest

LaCroix Ranger District
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File Code: 1570-1

Date: March 14, 2008

Route To:

Subject: Appeal of the Decision Memo for the Permanent Opening (Westside) Project,
Rapid River/Manistique/Munising Ranger Districts, Hia

To: Appeal Deciding Officer, Thomas Schmidt

This letter constitutes my recommendation for the subject appeal filed by Mr. Frank Jeff Verito on the Decision Memo for the Permanent Opening (Westside) Project on the Rapid River/Manistique/Munising Ranger Districts of the Hiawatha National Forest (HNF). District Ranger David Silvius was the Responsible Official for this decision. His Decision Memo was signed on December 20, 2007 and the legal notice was published on December 27, 2007 in *The Daily Press*, Escanaba, Michigan. The Notice of Appeal (NOA) was filed on March 1, 2008.

My review was conducted pursuant to 36 CFR 215 – “Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities.” To ensure the analysis and decision are in compliance with applicable laws, regulations, policies, and orders; I have reviewed and considered each of the issues raised by the Appellant and the decision documentation submitted by the HNF. My recommendation is based upon review of the Project Record (PR) including, but not limited to, the scoping letter, public comments, and the Decision Memo (DM).

This project maintains 16 existing permanent openings (approximately 5,100 acres) through the use of prescribed burning and/or mechanical/hand clearing techniques.

Appeal Issues: Mr. Verito raised three issues in his appeal of the Permanent Openings Decision. All issues were raised during the formal 30-day comment period unless otherwise noted. District Ranger, David Silvius and Forest Service employee Matt Cole contacted Mr. Verito by phone on January 17, 2008 to informally resolve the appeal. No resolution was reached on any of the appeal issues.

All appeal issues are addressed in the context of the following questions:

- 1) Is the proposed action within a category listed in Section 31.12 or 31.2 of the National Environmental Policy Act (NEPA) Handbook that is excluded from further analysis and documentation in an Environmental Impact Statement (EIS) or Environmental Assessment (EA)? Is it an appropriate use of the category? Is this category subject to notice, comment and appeal?
- 2) Did the Record show the Forest properly analyzed extraordinary circumstances related to the proposed action?
- 3) Does the Record demonstrate compliance with law, regulation, and policy?



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1) Is the Proposed Action categorically excluded from further documentation in an EA or EIS? Is it an appropriate use of the category? Is this category subject to notice, comment and appeal?

Response: The Council on Environmental Quality (CEQ) NEPA regulations at 40 CFR § 1507.3 provide that agencies may, after notice and comment, adopt categories of actions (known as categorical exclusions) that typically do not have a significant effect on the human environment and therefore do not require preparation of an EA or an EIS (40 CFR §§ 1500.4(p), 1501.4(a) (2), 1508.4). A categorical exclusion (CE) is not an exemption from the NEPA, but rather a method of complying with the NEPA. Categorical exclusions are an administrative tool to promote efficiency by reducing excessive paperwork for those categories of actions that, based upon extensive practice and experience, have been determined not to have (individually or cumulatively) significant environmental effects. Forest Service categorical exclusions are set forth in Forest Service Handbook (FSH) 1909.15, Chapter 30. This project involves Category #6. FSH 1909.15, Chapter 30, Section 31.2, states:

“Routine, proposed actions within any of the following categories may be excluded from documentation in an EIS or EA....

6. Timber stand and/or wildlife habitat improvement activities which do not include use of herbicides or do not require more than one mile of low standard road construction (Service level D, FSH 7709.56).”

The proposed action clearly fits within the Category as the project involves prescribed fire and/or a combination of mechanical/hand clearing to maintain “16 existing permanent openings to provide habitat for open-land species and to reduce hazardous fuels levels.” (DM, p. 1). No new roads would be constructed (PR, Public Scoping Letter, Tab C1). No herbicide use is planned in this decision. Review of the Record reveals no element of the project which falls outside of Category 6. Since this project involves the creation or maintenance of wildlife openings, it was subject to notice, comment, and appeal pursuant to Judge Singleton’s ruling in *Earth Island Institute v. Ruthenbeck*, 376 F.Supp.2d 994 (E.D. Cal. 2005). Accordingly, a 30-day comment period for the project was initiated in October, 2007.

2) Did the Record show the Forest properly analyzed extraordinary circumstances related to the proposed action?

Response: The Responsible Official properly determined that the Permanent Opening (Westside) Project fell within Categorical Exclusion 6. Having made that determination, he was then required by regulation (40 CFR § 1507.3) to determine whether there were extraordinary circumstances which would yet preclude application of the categorical exclusion. NEPA regulations require agencies to develop procedures “to provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.” (40 CFR § 1508.4). Resource conditions that should be considered in determining whether extraordinary circumstances related to the proposed action warrant further analysis and documentation are

listed in FSH 1909.15 § 30.3(2). The presence of a listed resource condition, which does not rise to the level of a “significant environmental effect,” does not preclude the use of a categorical exclusion. FSH 1909.15, 30.3(2) provides further clarification on when an extraordinary circumstance precludes the use of a categorical exclusion. This FSH provision was recently amended¹ to reflect Supreme Court jurisprudence (*Public Citizen v. U.S. Dept. of Transportation*):

“The mere presence of one or more of these resource conditions does not preclude the use of a categorical exclusion. It is (1) the existence of a cause-effect relationship¹ between a proposed action and the potential effect on these resource conditions and (2) if such relationship exists, it is the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.”

As described below, the Responsible Official examined the resource conditions set forth in FSH 1909.15, 30.3(2) and documented the rationale for why none of the resources were present in the project area or would not be significantly affected by the proposed action.

1. Federally Listed Threatened or Endangered Species or Designated Critical Habitat, Species Proposed for Federal Listing or Proposed Critical Habitat, or Forest Service Sensitive Species: In accordance with Section 7(c) of the Endangered Species Act (ESA), the HNF evaluated four federally-listed wildlife species (Piping plover, Kirtland’s warbler, Canada lynx, Hine’s emerald dragonfly) and five federally protected plant species (American hart’s tongue fern, Pitcher’s thistle, Lakeside daisy, Drarf lake iris, and Houghton’s goldernrod) as part of this project analysis (DM, pp. 2-3; Wildlife Biological Evaluation (BE), Tab D-1 and Botanical BE, Tab E-1). None of the federally-listed species have occupying habitats within the project area. Although habitat does exist for the Kirtland’s warbler, a determination of “no effect” was made by the biologist. Regional Forester Sensitive Species for both animals and plants were also considered. Analysis indicated the project would have either no impact on these species or a determination was made that actions “may impact individuals but [are] not likely to cause a trend to federal listing or loss of viability” (Ibid).
2. Floodplains, Wetlands, or Municipal Watersheds: The project area is not located within or adjacent to floodplains or municipal watersheds. There are several small seasonal wetlands. Protective measures (e.g., actions may be restricted to areas outside a buffer zone of 100 feet, or may be restricted to hand work only) will result in no effects (DM, p. 4).
3. Archaeological Sites or Historic Properties or Areas: The project area was site-reviewed by a qualified Forest Archaeologist. Report findings were sent to the State Historic Preservation Office (SHPO) as required under Section 106 of the National Historic Preservation Act (Heritage Specialist Report, Tab J1; DM, p. 5). Qualified sites will receive protection from opening maintenance activities (Ibid).

¹ A cause-effect relationship speaks to the existence of a linkage between the proposed action and listed resource condition over time and within the geographic area. 71 Fed. Reg. 75490.

4. All Other Categories of Extraordinary Circumstances: Congressionally designated areas, inventoried roadless areas, American Indian and Alaska native religious or cultural sites, or research natural areas were not present in the project area (DM, p. 4).

My review clearly indicates the Responsible Official considered all the specific resource conditions contained in FSH 1909.15, Section 30.3 including any cause-effect relationships (DM, pp. 2-5). I find the documentation, based on the best available science, supports the determination that no extraordinary circumstances exist related to the Permanent Openings (Westside) Project.

3) Does the Record demonstrate compliance with law, regulation, and policy?

Issue 1: Purpose and Need – Mr. Verito states, “*The best way to accomplish this objective is to leave the land be.*” (NOA, p. 1). “*Providing firebreaks for private owners adjacent to HNF lands is also no rational for altering public property.*” (NOA, p. 1).

Response: The purpose and need for the Permanent Openings Project is explained on page 2 of the DM. Specifically, these existing openings (characterized by shrubs, forbs, grasses and/or sedges) are being encroached upon by woody vegetation. Wildfire was once the primary natural disturbance factor maintaining these openings. However, fire suppression has greatly reduced the extent and diversity of this barren/savanna habitat. This has led to a greater need for man’s intervention (PR, Pre-NEPA Assessment, Tab L1). Continued opening maintenance will provide habitat for specialized wildlife and plant species.

“Openings also serve as natural firebreaks by keeping large accumulations of hazardous fuels away from private homes and property boundaries, and by breaking up large expanses of potentially volatile forest.” Mr. Verito challenges the decision based on his interpretation of the need to protect private dwellings and nearby communities. Although Mr. Verito disagrees with the term, “Wildland-Urban Interface”, it does apply to several communities on the Hiawatha that have a high fire risk (i.e., Powell Lake, Gooseneck/8Mile, 509/Whitefish, Stonington, and Westbranch). A “Wildland-Urban Interface” is defined by the Healthy Forest Restoration Act of 2003 (PR, Response to Comments, Tab B1).

It is clear from my review of the Project Record that the decision moves the treated acreage to the desired condition outlined in the Forest Plan. It meets a biological purpose of maintaining important wildlife habitats while protecting adjacent private lands. In making his decision, the Responsible Official evaluated each opening individually according to its importance in meeting wildlife and fuels management programs (PR, Meeting Notes, Tab K4). I find Mr. Verito’s statement unsubstantiated.

Issue 2: NNIS [Non-Native Invasive Species]: Mr. Verito contends, “*Spending money to treat NNIS caused by HNF personnel’s activities (as funding allows) is senseless, when this portion of the spread can be entirely avoided by keeping those activities out of those areas.*” (NOA, p. 2).

Response: This issue was not raised by Mr. Verito during the 30-day comment period.

The NEPA requires the Responsible Official to analyze the effects of a project, disclose them to the public, and reach a conclusion as to their significance (40 CFR 1502.1). As it pertains to the spread of NNIS, the Project Record (PR, Botanical BE, Tab E-1) clearly demonstrates that although a risk does exist for noxious weed invasion, as would be the case with most ground-disturbing activities, that risk is minimized with the application of specific design criteria for the project (DM, p. 3) including applying a variety of mechanical treatments (chainsaw, brush-hog, roller-chopping) to plant and or soil communities to reduce the potential spread of NNIS (DM, p. 2; PR, Fire Specialist Report, Tab F-1). Analysis indicates effects related to NNIS would not be significant (PR, BE, Tab E-1, p. 8). I also take note that the Responsible Official will treat invasive plants consistent with the Non-Native Invasive Plant Control EA and Decision signed on June 5, 2007 (PR, Pre-NEPA Assessment, Tab L1, p. 3).

Although Mr. Verito would prefer the HNF to not implement these actions, the Forest is following Forest Plan direction. The Responsible Official's decision weighs the competing needs of various resources based upon his expert knowledge of local conditions, input from the public, and other resource experts. His decision is well-reasoned and will achieve the purpose and need as described in the DM (p. 2).

Issue 3: Forest Plan: Mr. Verito states, *“Regarding the FP, the entire FP is under appeal and protest. It is meaningless because the public was never given an opportunity to impact what appeared in the final draft.”* (NOA, p. 2).

Response: The Permanent Openings (Westside) Decision is based on direction provided by the Hiawatha Forest Plan, revised on March 20, 2006 (The Responsible Official clearly documents that the Permanent Openings Project is consistent with the revised Forest Plan (DM, p. 5)). The Forest Plan was in itself formulated with extensive public input (Final Environmental Impact Statement (FEIS), pp. 1-3). The HNF used many methods to involve citizens in the process and share information including newsletters, public meetings, internet postings, and open houses. A formal comment period was held on proposed changes to the Plan as part of the Notice of Intent to revise the Plan, published in the Federal Register on September, 2003. The Draft EIS was likewise distributed for a three-month comment period beginning on March 26, 2005. Appendix L of the FEIS contains the public comments. The Chief of the Forest Service reviewed the Forest Plan and issued its decision on all appeals on June 22, 2007. The Chief's decision upheld the Hiawatha's Forest Plan. I find Mr. Verito's claim that the Forest Plan did not have sufficient opportunity for public comment as incorrect.

Recommendation:

After reviewing the Project Record and DM for the Permanent Openings (Westside) Project, and considering the issues raised by the Appellant, I recommend District Ranger David Silvieus' Decision Memo of December 20, 2007, be affirmed.

/s/ Nancy S. Larson
NANCY S. LARSON
District Ranger
Appeal Reviewing Officer

cc: Patricia Rowell